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HAROLD B. WILLEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. 544

ARNOLD SWARTZ and MAX GOODMAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Arnold Swartz and Max Goodman petition that a writ of certiorari issue to review a judgment entered against them on October 22, 1953 by the United States Court of Appeals for the Ninth Circuit, in a cause

pending in that Court, numbered and entitled "No. 13,678, Arnold Swartz and Max Goodman, Appellants, vs. United States of America, Appellee."

Said judgment affirms a judgment of conviction and sentence of 1 year and 1 day imprisonment together with a $2,000 fine imposed on petitioner Goodman, and a fine of $1,000 imposed upon petitioner Swartz by the United States District Court for the Territory of Hawaii, J. Frank McLaughlin, presiding, on September 25, 1952.

Said judgment and convictions were for an alleged violation of Section 641, Title 18, United States Code, to wit: concealing stolen government property.

THE INDICTMENT, ETC.

Petitioners were tried by jury and convicted on the second count of an indictment filed in the United States District Court for the Territory of Hawaii, charging them with feloniously concealing stolen government property.

Following presentation of the government's case, and again at the close of all the evidence, petitioners moved for a judgment of acquittal on the grounds that the evidence was insufficient to sustain a conviction and was based upon speculation and conjecture.

These motions were taken under advisement and denied by the trial judge only *after* verdict of the jury. (R. 489-490.)

Appeal was duly perfected and taken to the United States Court of Appeals for the Ninth Circuit, which overruled the contentions of petitioners and affirmed the judgment of the Court below, denying a rehearing in the matter.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

(a) Preliminary facts.

Petitioner Goodman is the owner of the Honolulu Supply Company, a firm dealing in scrap metal. Petitioner Swartz is his stepson, employed in the business.

Both have excellent reputations in the community and have never been in "trouble" before.

The two were indicted and convicted under Title 18 U.S.C., Sec. 641 of concealing, with intent to convert to their own use, property of the United States, namely certain zinc ingots belonging to the government, knowing the same to have been stolen.

Evidence was adduced that certain zinc ingots were stolen from the Navy and sold to the Supply Company. At the time of this transaction Goodman was in Guam and had no knowledge of the transaction. The dealings were had with Swartz who denied knowing that the items were stolen.

The Supply Company, having at the time 25 to 30 employees, shipped several items to a Los Angeles firm, California By-Products Corporation, among

which was discovered some zinc. No evidence was adduced as to

1. who in the Honolulu Supply Company shipped the zinc; or
2. whether the zinc so shipped was the same zinc as that stolen from the Navy; or
3. tying up either petitioner with this shipment or knowledge thereof.

Petitioners were not tried on a charge of *receiving* stolen property, but of *concealing* same, it being the theory of the government that the zinc was concealed by being shipped in drums to a customer of petitioners in California.

JURISDICTIONAL STATEMENT.

The Supreme Court has jurisdiction to review the judgment under 28 U.S.C. 1254 (1) and Paragraph 5(b) of Rule 38 of the Supreme Court.

QUESTION PRESENTED.

The question presented and raised by this petition is as follows:

Shall a conviction of a felony be permitted to stand against reputable persons where the evidence is utterly insufficient to sustain a conviction and where the conviction by the jury must have been based upon speculation and conjecture rather than evidence?

We do not ask this Court to weigh the evidence. We submit that THERE WAS ABSOLUTELY NO EVIDENCE of the existence of all the elements of the offense charged insofar as each petitioner is concerned.

WHY THE WRIT SHOULD BE GRANTED.

It has always been the law that in criminal prosecutions the government has the burden of proving to a moral certainty and beyond a reasonable doubt each element and material allegation of the offense charged.

The decision of the Court of Appeals in affirming the judgment of the Court below where the evidence is wholly lacking as to elements of the offense charged is to permit a conviction to stand based upon assumption, surmise, speculation and suspicion, rather than evidence as we know it.

Such a holding by a Court of Appeals is such a far departure from the accepted and usual course of judicial proceedings under our enlightened notions of due process, is so in conflict with the presumption of innocence and destructive of the rule that the proof of a defendant's guilt must be established beyond a reasonable doubt that it cries out for an exercise of this Court's power of supervision and correction.

PRAYER FOR ISSUANCE OF THE WRIT.

Wherefore, petitioners pray that this Court issue its writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit commanding said Court to certify and send to this Court on a day certain, to be therein designated a full and complete transcript of the record and proceedings of the cause numbered and entitled in said Court "No. 13,678, Arnold Swartz and Max Goodman, Appellants, vs. United States of America, Appellee," to the end that said cause may be reviewed by this Court as provided by law, that said judgment of said Court of Appeals be reversed and that your petitioners have such other and further relief in the premises as may seem just.

Dated, Honolulu, Hawaii,
January 18, 1954.

Respectfully submitted,
HYMAN M. GREENSTEIN,
Attorney for Petitioners.

Certificate of Counsel

I hereby certify that I am a member of the bar of the Supreme Court of the United States and that I am counsel for the petitioners in the above entitled cause and that, in my judgment, the foregoing petition is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, Honolulu, Hawaii,
January 18, 1954.

Hyman M. Greenstein,
Attorney for Petitioners.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No.

ARNOLD SWARTZ and MAX GOODMAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS AND JUDGMENTS OF THE COURTS BELOW.

The judgment of the trial Court was rendered and filed on September 25, 1952. (R. 20-23.)

The per curiam opinion and concurring opinion of Circuit Judge Pope, of the Court of Appeals, was filed October 22, 1953. (R. 509-513.) (Set forth in full in appendix.)

The judgment of the Court of Appeals was rendered and filed on October 22, 1953. (R. 513.)

A petition for rehearing before the Court of Appeals was filed on November 19, 1953, and denied November 23, 1953. (R. 514.)

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254 (1) and Paragraph 5(b) of Rule 38 of the Supreme Court.

The basis on which it is contended that this Court has jurisdiction is that the action of the Court of Appeals in affirming a judgment of conviction of the Court below upon a record wholly lacking of any evidence of certain of the elements of the offense charged is such a departure from the accepted and usual course of our judicial proceedings as to call for an exercise of this Court's power of supervision.

INDICTMENT AND STATUTE INVOLVED, ETC.

Petitioners were tried and convicted on the second count of an indictment filed in the United States District Court for the Territory of Hawaii, which count of the indictment charged the petitioners with violating Section 641 of Title 18 of the United States Code, said count reading as follows (R. 3-4):

> "That between the 8th day of September, 1950 and the 28th day of December, 1950, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Arnold

Swartz, the identical person named in Count I of this indictment, and Max Goodman, did knowingly, wilfully, unlawfully and feloniously conceal, with intent to convert to their use and gain, things of value of the United States, to-wit, 59 zinc ingots belonging to the United States Navy, weighing 3,311 pounds and having a value in excess of $100.00, the said Arnold Swartz and Max Goodman then and there knowing the said zinc to have been embezzled, stolen, purloined and converted, in violation of Section 641, Title 18, United States Code."

At the close of the government's case, and again at the conclusion of all the evidence in the case, petitioners made a motion for a judgment of acquittal, which motions were denied by the Court. (R. 468, 489.)

The Court sentenced petitioner Goodman to imprisonment for a year and a day and to pay a fine of $2,000 (R. 502), and sentenced petitioner Swartz to pay a fine of $1,000. (R. 502.)

The indictment is based on Section 641 of Title 18 U.S.C. This statute reads as follows:

"Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or things of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

STATEMENT OF THE CASE.

Goodman, age 66, is the owner of Honolulu Supply Company (R. 343); his stepson, Swartz, age 33, was in his employ. The firm does a substantial business dealing in scrap metals and employs 25 to 30 persons. (R. 343-359.)

Both petitioners have excellent reputations and have never been in "trouble" before.

Certain zinc ingots had been stolen from the Navy and had been sold to the company. Goodman was not in town at the time and had no knowledge of the transaction. (R. 365.) The dealings were had with Swartz who denied knowing that the items were stolen. (R. 302.)

Sometime in September, 1952, the company shipped to one of its customers in California 28 drums of scrap aluminum and 7 pieces of scrap aluminum. Contained in the same shipment was some zinc in two drums. (R. 117-118.)

There was no evidence adduced as to who packed or shipped this zinc; nor is there evidence in the entire record of the case that the zinc so shipped was the same zinc as that stolen from the Navy.

The record is likewise absolutely void and lacking in any evidence whatsoever indicating that either Goodman or Swartz had any knowledge of this shipment of zinc.

Upon the close of the government's case petitioners moved for a judgment of acquittal based upon the insufficiency of the evidence on the morning of August 6, 1952. (R. 264.) Following argument the Court announced it would take the matter under advisement until 2:15 p.m. of that day and give a ruling then. (R. 266.) The Court, upon reconvening that afternoon took the matter under advisement and directed the defense to go forward. (R. 266-267.) The Court continued to keep the motion under advisement until the end of the case. (R. 459.) When all the evidence was in, August 8, 1952, the motion was renewed (R. 468) but again the trial judge kept it under advisement. (R. 468.)

The verdict of the jury was returned August 8, 1952. (R. 487.)

On August 21, 1952, the trial judge denied the motion for acquittal kept under advisement until that time on the ground that "such doubts as I might have personally had on this subject, and as you all know it is a bothersome problem, have been resolved * * *" (by the jury). (R. 490.)

SPECIFICATION OF ERRORS RELIED UPON.

1. The opinion and judgment of the Court of Appeals in affirming the judgment of the Court below is in error in holding that there was competent and substantial evidence sustaining the conviction.

2. The Court of Appeals erred in failing to hold that the trial judge erred in failing to grant the motion of petitioners for judgment of acquittal on the ground of insufficiency of the evidence.

3. Not only was there insufficiency in the evidence to sustain a conviction but there was a total lack of evidence in certain of the elements of the offense charged so as to render this conviction a miscarriage of justice and to warrant the exercise of this Court's power of supervision and correction.

ARGUMENT.

I. THERE IS A TOTAL LACK OF EVIDENCE IN CERTAIN ELEMENTS OF THE OFFENSE CHARGED AS TO EACH PETITIONER.

It should be pointed out at the very start that we do not ask this Court to weigh the evidence in the record, nor do we quarrel with the substantive law enunciated by the Court of Appeals.

It is our position that the Court of Appeals did not give full consideration to the distinction between the offense of *concealing* stolen government property as compared with the offense of *receiving* such property.

This petition and case involves the offense of *concealing* stolen government property. Petitioners were not charged nor tried for the offense of *receiving* such property.

It is axiomatic that there must be sufficient proof as to each and every element of the offense charged as to the petitioners.

And it is our contention that there was a *total lack of evidence* as to one or more of the elements charged, as to each petitioner.

Elements of the offense.

Under the statute involved herein the government had the burden of establishing the following elements of the offense charged as to each petitioner:

1. That the zinc was government property;
2. that the same was stolen from the United States;

3. that petitioners concealed the same;

4. with intent to convert the same to their own use and gain;

5. knowing the same to have been stolen.

We admit that the government proved that certain zinc had been stolen from the Navy and had been sold to the Honolulu Supply Company. But from there on out, not only is the evidence insufficient, but it is *totally lacking* as to evidence spelling out the other elements of the offense charged.

As to petitioner Swartz.

1. There is absolutely no evidence in the record that Swartz had anything to do with the shipment of the zinc to California.

2. There is absolutely no evidence in the record that Swartz had anything to do with the holding of the zinc in California for further disposition or instructions.

3. There is absolutely no evidence in the record that the zinc shipped to the California concern was the same zinc as was stolen from the government.

4. There is no evidence in the record that Swartz concealed the stolen zinc.

5. There is no evidence in the record that Swartz participated in any act toward converting the stolen zinc to his own gain and use.

As to petitioner Goodman.

1. There is absolutely no evidence in the record that Goodman had anything to do with the purchase of the zinc; nor is there any evidence that he had knowledge that it was stolen.

2. There is no evidence in the record that Goodman personally had anything to do with the shipment of the zinc to California.

3. There is no evidence in the record that the zinc shipped to the California concern was the same zinc as was stolen from the government.

4. There is no affirmative evidence in the record that petitioner Goodman concealed the stolen zinc.

II. A VERDICT RESTING ON MERE SPECULATION AND CONJECTURE WILL NOT BE PERMITTED TO STAND.

The guilt of the petitioners could only have been brought about by the jury indulging in suspicions. This is contrary to law. *U.S. v. O'Brien*, 174 F. 2d 341, 345.

As this Court said in the case of *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333, 344, 77 L. Ed. 819, 825:

> "Leaving out of consideration, then, the inference relied upon, the case for respondent is left without any substantial support in the evidence, and a verdict in her favor would have rested upon mere speculation and conjecture. This, of course, is inadmissible."

The matter of the insufficiency of evidence gave the trial Court quite a bit of difficulty. He was "bothered" by the fact that no zinc was in evidence and that the zinc proved to have been shipped was not clearly shown to have been the same zinc as was proved to have been stolen. (R. 460 and 490.)

He was in error by saying that the problem was resolved by the verdict of the jury. (R. 490.) It was his duty to keep the case from the jury where the evidence would not sustain a possible conviction.

Though the Court of Appeals was quick to enter a *per curiam* opinion herein, Circuit Judge Pope, who concurred specially, also had "difficulties," and went so far as to state that "Conceivably zinc could have gotten in the shipment by mistake." (R. 511-512.)

> "There was no evidence that the ingots found by the California customer in his shipment were so marked. Nor did any witness testify as to who packed the drums. Conceivably zinc could have gotten in the shipment by mistake."
>
> From concurring opinion. (R. 511-512.)

CONCLUSION.

1. The Court of Appeals has ruled in effect that the convictions in the instant case should be affirmed where the evidence is not only insufficient but is totally lacking and void as to some of the elements of the offense charged.

2. This is such a far departure from the accepted and usual course of judicial proceedings under our principles of due process, is so in conflict with and in derogation of the presumption of innocence, and the requirement that a defendant's guilt must be established beyond a reasonable doubt that it fairly cries out for the exercise of this Court's power of supervision.

3. The world may little care what happens to the petitioners in this case, but if the principles of "due process of law" truly mean what our history of enlightened criminal jurisprudence teaches us, then here is a case where this Honorable Court should exercise its discretion and supervision, to the end that the writ be granted and a reversal of judgment as prayed for be finally entered herein.

Dated, Honolulu, Hawaii,
January 18, 1954.

HYMAN M. GREENSTEIN,
Attorney for Petitioners.

(Appendix Follows.)

Appendix

(R. 510-513)

United States Court of Appeals
For The Ninth Circuit

Arnold Swartz and Max Goodman, Appellants, vs. United States of America, Appellee.	No. 13,678 Oct. 22, 1953

Appeal from the United States District Court
for the District of Hawaii

Before: Stephens, Healy, and Pope, Circuit Judges

Per curiam

Appellant Goodman is proprietor of a company dealing in scrap metal. Appellant Swartz, Goodman's stepson, is employed in the business. The two were indicted and convicted under Title 18 U.S.C.A. § 641 of concealing, with intent to convert to their own use and gain, property of the United States, namely certain zinc ingots belonging to the Navy, knowing the same to have been stolen. The contention on appeal is that the evidence is insufficient to support the verdicts of guilty, the point having been raised by motion

for verdict and judgment of acquittal made at the conclusion of the trial.

There was some competent and substantial evidence before the jury tending fairly to sustain its verdict as regards both appellants. Beyond this it is not our function to inquire. *Hemphill v. United States,* 9 Cir., 120 F. 2d 115; *Maugeri v. United States,* 9 Cir., 80 F. 2d 199, 202.

The judgment is affirmed.

Pope, Circuit Judge, concurring specially:

Although I am concurring in the result, this case, to my mind, presents difficulties which are not reflected in the foregoing opinion. I think that I should state what those problems are, and what considerations have induced my concurrence.

Appellants were tried and convicted upon count 2 of the indictment, which count charged *concealing* stolen property of the United States. It did not charge *receiving* such property. Had that been the charge, the proof, particularly as to Swartz, would have been simple, for clearly it was known by Swartz to have been stolen when it was purchased at the place of business of the Honolulu Supply Company, the scrap metal concern owned by Goodman, who employed Swartz.

It was the government's theory that the zinc was concealed by being shipped in drums to a customer of Goodman's in California. This customer had not

ordered the zinc, and the invoices of the shipment (which included other metals which had been ordered), listed the contents as aluminum. The stolen zinc ingots bore the imprint "Missouri." There was no evidence that the ingots found by the California customer in his shipment were so marked. Nor did any witness testify as to who packed the drums. Conceivably zinc could have gotten in the shipment by mistake.

However, the F.B.I. agent investigating the matter of the stolen zinc went to appellants and made inquiry about it on September 8, 1950. It was a few days later, on September 22, that the drums were shipped. When the agent again interviewed Goodman on October 31, the latter said in the presence of Swartz that he had made no shipment of zinc since September 8. He made this statement notwithstanding he had been advised by the California customer, the latter part of September, of the arrival of the zinc there. Not until January 18, 1951, after the F.B.I. had itself located the zinc in California, did appellants' attorney notify the agent that the attorney had located the zinc in California on December 27, 1950. Following this notification the agent went to see Goodman who showed him the file relating to the shipment to California, including copies of the invoices. Certain listed drums were marked with circles and the letters "A.S." Later this file could not be found.

The evidence of motive and opportunity to conceal, when coupled with that of the false statement concerning shipments and the unexplainable delay in giving information as to the whereabouts of the zinc, and considered in the light of the fact that these were unused zinc ingots, not scrap, all adds up to a set of circumstances, consistent with each other, and with the hypothesis of guilt, and inconsistent with every reasonable hypothesis of innocence.

(Endorsed:) Opinion and Concurring Opinion. Filed Oct. 22, 1953. Paul P. O'Brien, Clerk.